IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: A736/2015

Date: 9/2/2017.

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED

9/2/2017 ..... Mdalana ....
DATE SIGNATURE

In the matter between:

TSHEPO MLANGENI

APPELLANT

And

THE STATE

RESPONDENT

JUDGMENT

MDALANA-MAYISELA AJ,

(1) The appellant, Mr Tshepo Mlangeni was charged in the Regional

Magistrate's Court, Benoni, with three counts of robbery with aggravating circumstances, two counts of attempted murder and one count of possession of an unlicensed firearm and one count of murder. The appellant was found guilty on all counts. He was sentenced to an effective term of life imprisonment and sixty five (65) years' imprisonment. The appellant was granted leave to appeal against the conviction and sentence on count seven, murder and leave to appeal against the sentences on counts one to seven. The appellant was legally represented throughout the trial proceedings in the Regional Court.

(2) The seventh count relates to the murder of James Aldo Monaco who was killed in the morning between 05h00 and 06h00 on the 3rd of April 2010. The deceased was the owner of Aldo's Lounge situated in MC Botha Drive, Vosloorus. At the time of his murder, he was in the company of his bodyguard, Mr Simon Mvubu and two other people and they were travelling in a BMW driven by the deceased. The deceased and his company were exiting the BP garage nearby Aldo's Lounge when a white Polo motor vehicle crashed into the right-hand side of his BMW. Two people alighted from the white Polo and fired shots at the deceased's BMW. Mr Mvubu in retaliation fired shots at the perpetrators using his 9mm Norinco firearm. The deceased was shot by the perpetrators and died on the scene of the crime.

(3) It is common cause that the deceased died as a result of gunshot wounds and that he did not suffer any injuries from the scene until a post-mortem was conducted. The identity of the perpetrators that killed the deceased is in dispute. The respondent relied on circumstantial evidence to prove that the appellant killed the deceased.

(4) In assessing circumstantial evidence WATERMEYER JA in R v Blom[1] referred to two cardinal rules of logic:

(i) The inference sought to be drawn must be consistent with all the proved facts. If it is not, then the inference cannot be drawn.

(ii) The proved facts should be such that they exclude every reasonable inference from them save the one to be drawn. If they do not exclude other reasonable inferences, then there must be a doubt whether the inference, sought to be drawn is correct.

(5) The trial court concluded that the only, reasonable inference to be drawn is that the appellant was the person that fired shots at the scene of murder in Vosloorus on the 3rd of April 2010. In doing so, the trial court relied on the evidence of Mr Mvubu that at midnight on the 2nd of April 2010 he saw the appellant inside the Aldo's Lounge in Vosloorus and the appellant told the witness that *"he wanted to work with this*

[1] 1939 AD 288 ad 202 - 203

white man". The trial court also relied on the undisputed evidence of Captain Hendriena Johanna Blignaut who examined the fired cartridge cases, one 9mm Parabellum Calibre test marked 942TC1, Daveyton CS 31/11/10, and one 9mm Parabellum Calibre marked 66861/10B, Vosloorus CAS 74/04/10 and concluded that the mentioned cartridge cases were fired from the same firearm. The trial court found that the firearm, a Norinco 9mm found in possession of the appellant on the 3rd of November 2010 was used at the scene of murder on the 3rd of April 2010. The trial court also relied on the evidence that in the commission of the offences in count one, three, four, five and seven that the appellant had been charged with, a firearm or an object resembling a firearm was used.

(6) The court, in assessing circumstantial evidence should avoid overlooking the possibility of other inferences which are equally probable or at least reasonably possible, or assuming the existence of facts which have not been proved and cannot legitimately be inferred. The evidence of Mr Mvubu that he saw the appellant in the midnight inside Aldo's Lounge telling the witness that "he wanted to work with this white man" cannot be regarded as an unlawful conduct on the part of the appellant, and does not place the appellant on the scene of the murder committed between 05h00 and 06h00 in the morning. The respondent's counsel conceded during the argument in the appeal hearing that that evidence is irrelevant to the commission of the murder. The trial court misdirected itself by relying on irrelevant

evidence in assessing circumstantial evidence.

(7) The trial court relied on the evidence that the appellant used a firearm or an object that resembled a firearm in the commission of the offence in counts one, three, four, five and seven. The offence in count one was committed on the 16th of September 2010. The offences in counts three and four were committed on the 2nd of November 2010 and the offences in count five and six were committed on the 3rd of November 2010. The offence of murder in count seven was committed on the 3rd of April 2010. Five months lapsed between the commission of the offence in count seven and the commission of the offence in count one. Seven months lapsed between the commission of the offence in count seven and the commission of the offences in counts five and six. The time that had lapsed between the commission of the said offences was too long for the trial court to infer that the appellant shot and killed the deceased.

(8) Captain Blignaut testified that she compared cartridge cases found on the scene, where Mr Xaba, complainant in counts three and four, was shot and the cartridge cases found on the scene where the deceased was shot. Her findings were that the said cartridge cases were fired from the same firearm. A 9mm Parabellum Calibre Norinco Model WP17 semi-automatic pistol was found in possession of the appellant on the 3rd of November 2010. The examined cartridge cases were

found to have been fired from the said firearm. The trial court also relied on this ballistic evidence in concluding that the only reasonable inference to be drawn is that the appellant shot and killed the deceased. The question is whether the evidence as a whole furnishes sufficient proof of guilt.

(9) What is sufficient according to MALAN JA in R v Mlambo[2], is that the respondent should:

> *"produce evidence by means of which such a high degree of probability is raised that the ordinary reasonable man, after mature consideration, comes to the conclusion that there exists no reasonable doubt that the accused has committed the crime charged. He must, in other words, be morally certain of the guilt of the accused"*

(10) In order for the respondent to succeed on count seven, murder, it must establish that the conduct of the appellant caused the death of the deceased. The respondent must prove that the appellant intentionally and unlawfully killed the deceased. The eye witness to murder, Mr Mvubu, testified that on the scene of the murder at the time of shooting, it was dark and as a result he could not identify the perpetrators. All that he could see was that two perpetrators shot at the deceased's BMW motor vehicle. One of the perpetrators was wearing a white cap and the other one was covering his face with

[2] 1957(4) SA 727 (A) ad 738 A

something. Both the perpetrators were firing shots using 9mm Parabellum firearms. Mr Mvubu also fired shots at the perpetrators in retaliation using a Norinco 9mm Parabellum firearm. When he saw the appellant at midnight on the 2nd of April 2010 his head and face were not covered. He could not identify the appellant or the young man he spoke to inside Aldo's Lounge as one of the perpetrators, who killed the deceased. The ballistic evidence alone on the fired cartridge cases is not sufficient to prove the guilt of the appellant beyond reasonable doubt.

(11) The appellant testified in his defence. He denied that he murdered the deceased. He denied any knowledge of the shooting incident that occurred on the 3rd of April 2010, in Vosloorus at the BP garage. The trial court rejected the version of the appellant on the basis that it was not reasonably possibly true. In S v V[3] the Supreme Court of Appeal held that the trial court in evaluating the evidence of the accused should adopt the following approach:

> *"It is trite that there is no obligation upon an accused person, where the State bears the onus, 'to convince the court'. If his version is reasonably possibly true he is entitled to his acquittal even though his explanation is improbable.*
>
> *A court is not entitled to convict unless it is satisfied not only that the explanation is improbable but that beyond any reasonable doubt it is false. It is permissible to look at the*

[3] 2000(1) SACR 453 (SCA) at paragraph 3

probabilities of the case to determine whether the accused's version is reasonably possibly true but whether one subjectively believes him is not the test. As pointed out in many judgments of this court and other courts the test is whether there is a reasonable possibility that the accused's evidence may be true."

(12) The trial court was wrong in rejecting the version of the appellant on count seven. The respondent failed to prove beyond a reasonable doubt that the appellant unlawfully and intentionally killed the deceased on the 3rd of April 2010. The appellant should be acquitted on count seven, murder.

(13) In all the circumstances I believe that the trial court was incorrect in convicting the appellant on count seven. In the result the appeal is upheld and the conviction and sentence on count seven are set aside.

(14) The appellant was sentenced to an effective period of life imprisonment and sixty five (65) years' imprisonment. The sentences were not ordered to run concurrently because the trial court had already reduced the sentence on some of the counts. However, the trial court failed to take into account the cumulative effect of the sentences.

(15) Firstly, on sentencing I wish to deal with a sentence imposed on count six. The appellant was convicted on count six with possession of an unlicensed firearm to wit a 9mm Parabellum Calibre Norinco Model WP17 semi-automatic pistol. He was sentenced to fifteen (15) years' imprisonment in terms of the Criminal Law Amendment Act[4]. The appellant was not warned by the trial court of the application of section 51(1) or 51(2) of the Act[5] and the consequences thereof, at the outset of the trial. In S v Motloung[6] the Supreme Court of Appeal discussed the co-existence of the Firearms Control Act[7] and the Criminal Law Amendment Act[8]. The Supreme Court of Appeal held that because the appellant was not warned that a sentence could be imposed as prescribed by the Criminal Law Amendment Act[9], such a sentence will be an injustice. In the present case the charge sheet did not make mention of Criminal Law Amendment Act[10]. The respondent has conceded in its heads of argument that the minimum sentence of fifteen (15) years' imprisonment imposed by the trial court on count six is inappropriate and should be substituted with a suitable sentence. In the circumstances a sentence of fifteen (15) years' imprisonment on count six is set aside and substituted with a sentence of five (5) years' imprisonment.

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[4] Act 105 of 1997
[5] *Supra*
[6] 2016(2) SACR 243 (SCA)
[7] Act 60 of 2000
[8] *Supra*
[9] *Supra*
[10] *Supra*

(16) In considering the cumulative effect of the sentences imposed on count one, two, three, four, five and six, I still find an effective sentence of fifty five (55) years' imprisonment to be excessive. In S v Moswathupa[11], it was held that where multiple offences need to be punished, the court has to seek an appropriate sentence for all offences taken together. When dealing with multiple offences a court must not lose sight of the fact that the aggregate penalty must not be unduly severe.

(17) The respondent in its heads of argument has conceded that the trial court misdirected itself by not taking into account the cumulative effect of the sentences imposed and ordering the sentences to run concurrently. I have considered all the personal circumstances of the appellant as stated in the record including the period of two years spent in prison awaiting trial. I have also considered the seriousness of the offences the appellant is convicted of and the interests of society. I found the sentences imposed by the trial court on counts one, two, three, four and five to be fair and just.

(18) In the circumstances I make the following order:

a) The appeal on both conviction and sentence on count seven

[11] 2012(1) SACR 259 (SCA)

succeeds. The conviction and sentence on count seven are set aside;

b) The sentences imposed by the trial court on counts one, two, three, four and five are confirmed;

c) The sentence imposed by the trial court on count six of fifteen (15) years' imprisonment is set aside and substituted with a sentence of five (5) years' imprisonment;

d) The sentences imposed by the trial court on counts one, two and three of ten (10) years' imprisonment on each count, are ordered to run concurrently with the sentence of fifteen (15) years' imprisonment imposed on count four;

e) The sentence of five (5) years' imprisonment imposed on count six is ordered to run concurrently with the sentence of fifteen (15) years' imprisonment imposed on count four.

f) The effective sentence imposed on the appellant is twenty (20) years' imprisonment.

Acting Judge MP Mdalana-Mayisela

I agree and it is so ordered.

Judge L Windell

Case number	: A736/2015
Matter heard on	: 7 February 2017
For the Appellant	: Adv MMP Masete
Instructed by	: Legal Aid Board
For the Respondent	: Adv A Roos
Instructed by	: Director of Public Prosecutions
Date of Judgment	: 9 February 2017